

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
CBS CORPORATION, f/k/a, VIACOM INC.,	)	
f/k/a CBS CORPORATION, f/k/a	)	
WESTINGHOUSE ELECTRIC CORPORATION,	)	
et al.,	)	
	)	
Defendant.	)	Cause No. 1:81-cv-0448-RLY-KPF
	)	
THE CITY OF BLOOMINGTON, INDIANA, et al.,	)	JUDGE RICHARD L. YOUNG
	)	
	)	
Plaintiffs,	)	
	)	
	)	MAGISTRATE JUDGE KENNARD P. FOSTER
v.	)	
	)	
CBS CORPORATION, f/k/a, VIACOM INC.,	)	
f/k/a CBS CORPORATION, f/k/a	)	
WESTINGHOUSE ELECTRIC CORPORATION,	)	
et al.,	)	
	)	
Defendant.	)	

AGREED AMENDMENT TO THE CONSENT DECREE PROVIDING  
FOR REMEDIAL ACTIONS AT NEAL'S LANDFILL  
LEMON LANE LANDFILL, AND BENNETT'S DUMP  
AND ADDRESSING GENERAL MATTERS

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WHEREAS, this Court entered a consent decree in this civil action on August 22, 1985 (the “Original Consent Decree”) resolving certain matters at issue in this litigation between the plaintiffs, the United States of America (the “United States”), the State of Indiana and the Indiana Department of Environmental Management (both entities referred to herein collectively as the “State”), Monroe County, Indiana (the “County”), the City of Bloomington, Indiana and the Utilities Service Board of Bloomington, Indiana (previous two entities referred to herein collectively as the “City”), and the remaining defendant, CBS Corporation, formerly known as Westinghouse Electric Corporation and Viacom Inc. (hereinafter referred to as “CBS”), all of whom shall be referred to herein collectively as the “Parties;”

WHEREAS, the Original Consent Decree required, among other things, that CBS design, build and operate an incinerator to incinerate Polychlorinated Biphenyls (“PCBs”) and other materials that CBS excavated and removed from six sites in and around Bloomington, Indiana – namely, Winston Thomas Sewage Treatment Plant (“Winston-Thomas Facility”), Anderson Road Landfill, Neal’s Dump, Neal’s Landfill, Bennett’s Dump and Lemon Lane Landfill;

WHEREAS, on February 8, 1994, the Parties submitted a status report informing the Court that they had decided to explore whether alternative clean-up measures should be used to replace the incineration remedy set forth in the Original Consent Decree. Along with the status report, the Parties submitted a statement of agreed-upon operating principles that would guide the Parties’ consideration of alternatives;

WHEREAS, on August 18, 1997, the Court entered the First Amendment to the Consent Decree, providing for implementation of alternative clean-up measures for the

sludge drying beds and sludge digesters at Winston-Thomas Facility – one of the sites addressed in the Original Consent Decree;

WHEREAS, on November 25, 1997, the Court ordered the Parties to proceed with an alternative method of disposing of wastes from the interim storage facility (required under Section XII of the Original Consent Decree), which held materials that had been excavated in accordance with the terms of the Original Consent Decree from the Anderson Road Landfill, a second site addressed in the Original Consent Decree, and certain streambeds, also addressed in the Original Consent Decree;

WHEREAS, on June 8, 1998, the Court approved a Stipulation Concerning Removal Measures for Selected Portions of the Winston-Thomas Facility, which provided for implementation of agreed upon alternative clean-up measures for the tertiary lagoon, trickling filter, and abandoned lagoons at the Winston-Thomas Facility;

WHEREAS, on February 8, 1999, the Court approved an Amendment to the Consent Decree for Neal’s Dump Remedial Action, which provided for implementation of agreed upon alternative clean-up measures at Neal’s Dump – a third site addressed in the Original Consent Decree;

WHEREAS, on January 20, 1999, Magistrate Judge Kennard Foster, as Special Master appointed by the Court, issued his Report and Recommendation (hereinafter “Report”). In this Report, the Special Master, *inter alia*, reported that the Parties had reached consensus with respect to alternative excavation components of the remedies at the three other sites addressed in the Original Consent Decree –Neal’s Landfill, Lemon Lane Landfill, and Bennett’s Dump (the “Remaining Sites”) – but that they continued to have disputes over other issues, including the United States’ demands for water treatment,

sediment removal, cost recovery, and natural resource damages, and CBS's defenses to those claims. The Special Master further reported that the Parties agreed to continue to negotiate the disputed issues;

WHEREAS, on February 1, 1999, the Court issued an Order approving the Special Master's Report and Recommendation and directed the Parties to proceed with selection and implementation of alternative excavation components of remedies at the Remaining Sites addressed in the original Consent Decree. The Court further ordered the Parties to engage in settlement negotiations regarding water treatment, sediment removal, cost recovery, and natural resource damages;

WHEREAS, CBS has now completed the alternative excavation components of the remedies at Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump in accordance with Record of Decision ("ROD") Amendments issued by the U.S. Environmental Protection Agency ("U.S. EPA") on October 16, 1998, March 29, 1999, and May 12, 2000 after U.S. EPA received and responded to public comments regarding the alternative excavation components of the remedies;

WHEREAS, the Parties have completed their settlement discussions regarding water treatment, sediment removal, cost recovery, and natural resource damages and now have agreed to the terms set forth in this Amendment to the Consent Decree;

WHEREAS, with respect to the remedial actions set forth in this Amendment to the Consent Decree, U.S. EPA has (1) published for public comment proposed plans explaining the alternative remedial actions to be performed at Neal's Landfill, Lemon Lane Landfill and Bennett's Dump, (2) responded to public comments received during each of the applicable public comment periods, and (3) published ROD Amendments



setting forth the remedial actions to be performed at the Remaining Sites, and

WHEREAS, the Parties intend for all provisions of the Original Consent Decree, as previously amended, to remain in full force and effect, except as is specifically modified or amended by this Consent Decree Amendment;

NOW THEREFORE, with the consent of the Parties, it is hereby Ordered, Adjudged, and Decreed that the original Consent Decree be amended as follows:

## **I. DEFINITIONS**

Unless otherwise expressly provided herein, terms used in this Amendment to the Consent Decree which are defined in the Comprehensive Environmental Response, Compensation and Liability and Act (“CERCLA”), 42 U.S.C. § 101 *et seq.*, in regulations promulgated under CERCLA, or in the Original Consent Decree, shall have the meaning assigned to them in CERCLA, in such regulations or in the Original Consent Decree.

Whenever terms listed below are used in this Amendment to the Consent Decree or in the Appendices attached hereto and incorporated hereunder, the following definitions shall apply:

A. “Amendment to the Consent Decree” or “Amendment” shall mean this Amendment, all Appendices attached hereto, all plans reviewed and approved by U.S. EPA under this Amendment and its Appendices, and all plans incorporated by reference into the Amendment or its Appendices. In the event of conflict between this Amendment and any Appendix, this Amendment shall control.

B. “Bloomington Special Account” shall mean the special account established for the sites covered by this Amendment to the Consent Decree pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. §9622(b)(3) and this Consent Decree.

C. “Consent Decree” shall mean the Original Consent Decree entered by the Court on August 22, 1985 as modified by this Amendment and by the orders of the Court issued on April 18, 1996 (modifying decree with respect to Bennett’s Dump), August 18, 1997 (modifying decree with respect to the Winston-Thomas Facility), November 25, 1997 (modifying decree with regard to the interim storage facility), June 8, 1998 (modifying the decree with respect to the Winston-Thomas Facility) and February 9, 1999 (modifying the decree with respect to Neal's Dump).

D. “Effective Date” shall mean the date upon which this Amendment to the Consent Decree is entered as an order of this Court, as set forth in Paragraph XIV of this Amendment to the Consent Decree.

E. “Governmental Parties” shall mean the United States of America (the “United States”), the State of Indiana and the Indiana Department of Environmental Management (both entities referred to herein collectively as the “State”), Monroe County, Indiana (the “County”), and the City of Bloomington, Indiana and the Utilities Service Board of Bloomington, Indiana (previous two entities referred to herein collectively as the “City”).

F. “ICS Treatment Plant” shall mean the spring water treatment facility constructed by U.S. EPA at Illinois Central Spring as a removal action in connection with Lemon Lane Landfill.

G. “National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

H. “Operation and Maintenance” or “O & M” shall mean all activities required

to maintain the effectiveness of the Remedial Action as required under the Operation and Maintenance Plans approved or developed by U.S. EPA pursuant to the attached Statements of Work (“SOWs”).

I. “Original Consent Decree” shall mean the text of the Consent Decree as entered by this Court on August 22, 1985, prior to any amendment thereto. To the extent that any provision of the Original Consent Decree refers to Westinghouse or Westinghouse Electric Corporation, it is understood that the Party referred to is now known as CBS Corporation.

J. “Paragraph” shall mean, depending on the context, the individual paragraphs of this Amendment to the Consent Decree referred to by the appropriate designation in this Amendment to the Consent Decree (e.g. “Paragraph IV.A of this Amendment to the Consent Decree”), or to an individual paragraph of the Original Consent Decree identified by an Arabic numeral (e.g., “Paragraph 82 of the Original Consent Decree”).

K. “Performance Standards” shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action, set forth in the attached ROD Amendments and SOWs.

L. “Record of Decision Amendments” or “ROD Amendments” shall mean the U.S. EPA Record of Decision Amendments setting forth the Remedial Actions to address Source Control and contamination of groundwater, surface water and sediment at Neal’s Landfill (issued on September 25, 2007), Lemon Lane Landfill (issued on September 29, 2006), and Bennett’s Dump (issued on September 26, 2006) , which are attached as Appendices hereto.

M. “Remaining Sites” shall mean Bennett’s Dump, Lemon Lane Landfill, and

Neal's Landfill.

N. "Remedial Actions" shall mean those activities, except for Operation and Maintenance, to be undertaken and previously undertaken by the CBS at each of the Remaining Sites – Bennett's Dump, Lemon Lane Landfill, and Neal's Landfill – pursuant to the Consent Decree.

O. "Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States has incurred or will incur in the future at or in connection with Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump, plus interest on all such costs which has accrued or may accrue in the future.

P. "Section" shall mean, depending on the context, the Sections of this Amendment to the Consent Decree or the Sections of the Original Consent Decree, designated by the appropriate Roman numeral.

Q. "Statement of Work" or "SOW" shall mean any Statement of Work for implementation of the Remedial Designs, Remedial Actions, and Operation and Maintenance at Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump, and any modifications to such Statements of Work.

R. "Work" shall mean all activities CBS is required to perform under this Amendment to the Consent Decree.

## **II. REMEDIAL PROVISIONS OF ORIGINAL CONSENT DECREE SUPERSEDED BY THIS AMENDMENT**

Notwithstanding any provisions contained in the Original Consent Decree, CBS shall perform the alternative response actions set forth below in Section IV of this Amendment to the Consent Decree with respect to Neal's Landfill, Lemon Lane Landfill,

and Bennett's Dump. As a result of this change in response actions, CBS will no longer be required or allowed to perform the response actions identified below in Paragraphs II.A through II.M, except as specifically stated in this Amendment to the Consent Decree:

**A. Design, Construction and Operation of Incinerator:** CBS shall not be required to perform those duties generally described in Section IV (Purpose and Summary of Activities) of the Original Consent Decree regarding the design, construction, and operation of an incinerator or ash landfill, and shall not be required to perform those specific duties relating to incineration and the disposal of incinerator ash set forth in the following Sections of the Original Consent Decree:

- Section V (Incinerator Obligations);
- Section VI (Solid Waste Supplied by the City and County);
- Section VII (Ash Disposal);
- Section XXII (Permits and Construction Schedule).

**B. Excavation and Transportation:** CBS shall not be required to perform any further duties described in Section VIII (Removal Measures) of the Original Consent Decree relating to the excavation and transportation for incineration of materials within the horizontal and vertical dimensions of Bennett's Dump, Lemon Lane Landfill, and Neal's Landfill, and from buffer zones around them.

**C. Sediment Removal:** CBS has satisfied the requirements for sediment removal specified in Paragraph 51(a)-(f) of Section VIII (Removal Measures) of the Original Consent Decree. CBS shall not be required to perform those post-closure sediment removal activities set forth in Paragraph 51(g) of the Original Consent Decree.

**D. Closure:** CBS shall not be required to perform those closure duties set forth in Section IX (Closure) of the Original Consent Decree with respect to Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump. CBS has previously closed the Winston-Thomas Facility and Neal's Dump sites in accordance with the requirements of the Consent Decree. CBS has no closure obligations with respect to Anderson Road Landfill under the Consent Decree.

**E. Post-Closure:** CBS shall not be required to perform those post-closure duties set forth in Section X (Post-Closure) of the Original Consent Decree with respect to Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump. CBS's post-closure duties with respect to the Winston-Thomas Facility and Neal's Dump are set forth in the prior amendments to the Consent Decree approved by the Court on August 18, 1997 and February 8, 1999, respectively. CBS has no post-closure obligations with respect to Anderson Road Landfill under the Consent Decree.

**F. Interim Measures:** CBS has fully complied with the requirements of Section XI (Interim Measures) of the Original Consent Decree. As of the Effective Date, Paragraph 59(a) of the Original Consent Decree shall no longer apply with respect to the continued operation of the interim water treatment facility at Neal's Landfill, but CBS shall operate that facility in accordance with the terms of the Neal's Landfill SOW for Operable Units 2 and 3 attached at Appendix I and applicable provisions of this Amendment to the Consent Decree. Consistent with Section 121(e)(1) of CERCLA, 42 U.S.C. § 9621(e)(1), no National Pollutant Discharge Elimination System ("NPDES") permit or other permit from any governmental authority shall be required for the operation of that facility as of the Effective Date of this Amendment to the Consent Decree. Accordingly, as of the Effective

Date, the existing NPDES permit for the facility shall be deemed terminated.

**G. Interim Storage:** CBS is not presently storing materials containing PCBs pursuant to Section XII (Interim Storage of Materials Containing PCBs) of the Original Consent Decree and shall have no further obligation to do so. CBS shall close the existing Interim Storage Facility (“ISF”) in accordance with 40 C.F.R. § 761.61 and all other applicable federal, state, and local requirements related to closure of the ISF and ISF premises and pay the expenses thereof. CBS shall complete the closure of the ISF within one year of the Effective Date, including the demolition of the ISF, the removal of the demolished ISF from the Winston-Thomas Facility, and the restoration of the site on which the ISF was constructed by bringing to an even grade, seeding with grass seed and covering with straw. CBS shall perform verification sampling after the ISF is removed to ensure the soils beneath and no more than 25 feet from the building perimeter of the removed ISF do not exceed 2 ppm PCBs on average with no single sample being greater than 5 ppm PCBs.

**H. Groundwater Monitoring Protocol:** As of the Effective Date, CBS shall not be required to perform those duties set forth in Paragraphs 71-78 of Section XIII (Groundwater Monitoring Protocol) of the Original Consent Decree with respect to Neal’s Landfill, Lemon Lane Landfill, and Bennett’s Dump, but CBS shall perform the alternative Groundwater Monitoring Protocols set forth in each of the SOWs for the Remaining Sites with respect to groundwater, surface water, and sediment contamination. Paragraph 82 of the Original Consent Decree shall remain in full force and effect.

**I. Reporting:** CBS shall not be required to comply with the requirements in Section XIV (Reporting) of the Original Consent Decree. Specific reporting requirements relating to the Neal’s Landfill, Lemon Lane Landfill, and Bennett’s Dump sites are set

forth in the SOWs for each site attached to this Amendment to the Consent Decree.

**J. Parties to Be Notified:** Section XV of the Original Consent Decree is hereby rescinded and superseded. Each Party designates the following persons as its representatives for purposes of receipt of notice submitted pursuant to this Consent Decree and its amendments:

As to the United States Department of Justice

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
DOJ #: 90-7-1-212A

As to the U.S. Environmental Protection Agency  
(with respect to notice of payment under Section VI.B.2)

Chief, Superfund Accounting  
U.S. Environmental Protection Agency  
Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Regional Counsel  
ATTN: Bloomington Sites  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard  
Chicago, IL 60604

Director, Superfund Division  
Remedial Project Manager  
ATTN: Bloomington Sites  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard  
Chicago, IL 60604



As to the U.S. Environmental Protection Agency  
(with respect to all other notices under the Consent Decree)

Regional Counsel  
ATTN: Bloomington Sites  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard  
Chicago, IL 60604

Director, Superfund Division  
Remedial Project Manager  
ATTN: Bloomington Sites  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard  
Chicago, IL 60604

As to the U.S. Department of the Interior  
(with respect to notice of payment under Section under Section VII.B.2)

Department of the Interior  
Natural Resource Damage Assessment and  
Restoration Program  
Attn: Restoration Fund Manager  
1849 C Street, NW  
Mailstop 4449  
Washington, DC 20240

Office of the Solicitor  
Division of Parks and Wildlife  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

As to the State of Indiana:

Valerie Tachtiris  
Deputy Attorney General  
Office of the Indiana Attorney General  
IGCS, 5<sup>th</sup> floor  
302 West Washington Street  
Indianapolis, Indiana 46204

Jessica Huxhold Fliss  
Federal Programs Section  
Office of Land Quality  
100 N. Senate Ave  
MC 66-31 IGCN 1101  
Indianapolis, IN 46204-2251  
Ph (317)233-2823

As to the City of Bloomington:

Director of Utilities  
P.O. 1216  
600 East Miller Drive  
Bloomington, Indiana 47402  
(812) 349-3683 (fax)

Corporation Counsel  
City of Bloomington  
P.O. Box 100  
401 North Morton Street  
Bloomington, Indiana 47402  
(812) 349-3441 (fax)

As to Monroe County:

President, Monroe County Board of  
Commissioners  
Monroe County Courthouse, Room 322  
100 West Kirkwood Avenue  
Bloomington, IN 47404

Dr. Thomas W. Sharp  
Health Officer  
Monroe County Board of Health,  
119 West Seventh St,  
Bloomington IN 47404

As to CBS Corporation:

Dorothy M. Alke  
Director, Bloomington Project  
CBS Corporation  
11 Stanwix Street  
Pittsburgh, PA 15222  
(412) 642-2562  
[dottie.alke@cbs.com](mailto:dottie.alke@cbs.com)

With respect to legal matters, a copy to:

David R. Berz  
David B. Hird  
Weil, Gotshal & Manges LLP  
1300 Eye Street, N.W.  
Washington, D.C. 20005  
(202) 682-7000  
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Each Party may change the identities of its representatives upon written notice to the other Parties. Also, each Party, upon notice to the other Parties, may designate a different individual to receive notice with respect to a specific topic (e.g., the on-scene coordinator of a particular site may be designated to receive technical documents relating to that site).

**K. Insurance:** Paragraph 99 of Section XX (Insurance) of the Original Consent Decree is hereby rescinded.

**L. CBS's Right To Seek Modification of the Remedy:** Paragraph 114(i) of the Original Consent Decree is hereby rescinded.

**M. Document Retention:** Paragraph 86 of the Original Consent Decree is hereby rescinded and superseded.

(1) With respect to each of the Remaining Sites, CBS shall preserve and retain, and instruct its contractors and agents to preserve, until 10 years after CBS's receipt

of the notification by U.S. EPA under the “Completion of the Work” provision of the attached SOWs that CBS has performed the Work in accordance with the Consent Decree, all non-identical copies of the last draft or final version of any documents or records (including documents or records in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work, provided, however, that CBS (and its contractors and agents) must also retain copies of all data generated during the performance of the Work and not contained in the aforementioned documents required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

(2) With respect to each of the other sites covered by the Original Consent Decree (i.e. Neal’s Dump, Anderson Road Landfill and the Winston-Thomas Facility), CBS shall preserve and retain, and instruct its contractors and agents to preserve all non-identical copies of the last draft or final version of any documents or records (including documents or records in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of work (including operation and maintenance activities) required under the Original Consent Decree as amended with respect to such site, provided, however, that CBS (and its contractors and agents) must also retain copies of all data generated during the performance of the work and not contained in the aforementioned documents required to be retained. Each of the above record retention requirements shall apply, regardless of any corporate retention policy to the contrary, until ten (10) years after completion of the work (including operation and maintenance activities) required under the Original Consent Decree as amended with respect to such site, or until five (5) years after entry of this Amendment to

the Consent Decree, whichever is later.

(3) At the conclusion of the document retention periods set forth above in Paragraphs II.M(1) and II.M(2), CBS shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, CBS shall deliver any such records or documents to U.S. EPA. CBS may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If CBS asserts such a privilege, it shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by CBS. However, no documents, reports, or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged. Nor shall CBS claim privilege with respect to any data (excluding interpretations of results) relating to conditions at the Remaining Sites or in areas affected by releases from the Remaining Sites. Nothing in this Paragraph II.M.2 shall diminish CBS's right to claim privilege in response to a document demand or subpoena by a third-party.

N. **Original Consent Decree As Previously Amended Remains in Full Force and Effect:** Except as expressly provided in this Amendment to the Consent Decree, all terms of the Original Consent Decree as previously amended shall remain in full force and effect.

### **III. GEOGRAPHIC BOUNDARIES OF CONSENT DECREE SITES**

A. The geographic boundaries of Bennett's Dump are revised by replacing Exhibit 2 (Bennett's Dump – South Area – Metes and Bounds of Horizontal Limit of Site) of the Original Consent Decree with the attached Appendix A.

B. The geographic boundaries of Lemon Lane Landfill are revised by replacing Exhibit 7 (Lemon Lane Landfill – Metes and Bounds of Horizontal Limit of Site) of the Original Consent Decree with the attached Appendix B.

C. The geographic boundaries of Neal's Landfill are revised by replacing Exhibit 9 (Neal's Landfill – Metes and Bounds of Horizontal Limit of Site) of the Original Consent Decree with the attached Appendix C.

D. To the extent that CBS investigates or remediates areas outside of the geographical boundaries of the Remaining Sites (as defined by Appendices A, B and C), CBS may petition the U.S. EPA for expansion of the boundaries of the Remaining Site(s) to include the additional areas investigated or remediated in the course of performing the Work. In the event that U.S. EPA, in consultation with the other Governmental Parties, agrees that CBS adequately investigated or remediated the additional areas pursuant to the Work required by this Amendment to the Consent Decree, the Parties shall file with the Court a revised version of the appropriate Appendix (or Appendices) to reflect the expanded boundaries of the Site(s). In the event that U.S. EPA denies CBS's petition, CBS may challenge U.S. EPA's decision under Section XXIV (Disputes Resolution) of the Original Consent Decree on the grounds that U.S. EPA's determination is arbitrary and capricious, otherwise not in accordance with law, or inconsistent with terms of this Consent Decree.

E. The geographic boundaries of Winston-Thomas Facility, Neal's Dump, and Anderson Road Landfill remain as specified in the Original Consent Decree, as amended prior to this Amendment to the Consent Decree.

#### **IV. ALTERNATIVE REMEDIES FOR NEAL'S LANDFILL, LEMON LANE LANDFILL, AND BENNETT'S DUMP**

##### **A. Bennett's Dump:**

###### **1. Source Control Operable Unit**

CBS has completed all Work required for implementation of the remedy for the Source Control Operable Unit for Bennett's Dump ("Operable Unit 1") in accordance with U.S. EPA's ROD Amendment of October 16, 1998, except O&M. CBS shall continue and complete performance of O&M and other requirements set forth in the March 2002 – Long-term Groundwater Monitoring Plan, which is herein incorporated by reference into this Amendment. When this plan is updated pursuant to the terms of this Amendment or the attached Statement of Work for Bennett's Dump at Appendix E, the updated plan shall replace and supersede the March 2002 plan.

###### **2. Groundwater, Surface Water and Sediment Operable Unit**

CBS shall perform all Work at Bennett's Dump in accordance with (i) the Bennett's Dump Record of Decision Amendment for the Groundwater, Surface Water and Sediment Operable Units ("Bennett's Dump ROD Amendment for OU2/3"), which is attached at Appendix D, (ii) the Bennett's Dump Statement of Work for the Surface Water, Groundwater and Sediment Remedial Action, ("Bennett's Dump SOW for OU2/3"), which is attached hereto as Appendix E, and (iii) all work plans and other plans, standards, specifications, and schedules approved by U.S. EPA under the Bennett's

Dump SOW for OU2/3 after reasonable opportunity for review and comment by the other Governmental Parties.

### **3. Completion**

CBS shall continue to implement the Remedial Action and O&M at Bennett's Dump until (1) CBS submits a demonstration pursuant to the "Completion of Work" clause in the Bennett's Dump SOW for OU2/3 that all Work at Bennett's Dump required under Paragraphs IV.A.1 and IV.A.2 above have been fully performed and (2) either U.S. EPA approves this demonstration or the Court overrules EPA's disapproval of CBS's demonstration pursuant to the "Completion of Work" clause in the Bennett's Dump SOW for OU2/3 on the grounds that CBS has fully performed all Work at Bennett's Dump required under Paragraphs IV.A.1 and IV.A.2.

#### **B. Lemon Lane Landfill:**

##### **1. Source Control Operable Unit**

CBS has completed all Work required for implementation of remedy for the Source Control Operable Unit for Lemon Lane Landfill ("Operable Unit 1") in accordance with U.S. EPA's ROD Amendment of May 12, 2000, except O&M. CBS shall continue and complete performance of O&M and other requirements set forth in the approved plans under the Statement of Work for the Source Control Remedial Action at Lemon Lane Landfill. These approved plans, which are herein incorporated by reference into this Amendment, are as follows:

- June 2001 - Final RCRA Cap Inspection and Maintenance Plan for the Lemon Lane Landfill Site
- April 2003 - Long-term Groundwater Monitoring Plan for the Lemon Lane Landfill Site



In the event that either of the above plans is updated pursuant to the terms of this Amendment or the attached Statement of Work for Lemon Lane Landfill at Appendix G, the updated plan shall replace and supersede the relevant plan listed above.

**2. Groundwater, Surface Water and Sediment Operable Units**

a. CBS shall take over and continue operation of the ICS Treatment Plant no later than 20 days after the Effective Date of this Amendment to the Consent Decree. The City agrees to allow CBS unlimited access to the property on which the ICS Treatment Plant is located and to Lemon Lane Landfill for as long as is necessary to complete the Work required under this Amendment. To the extent that the United States, the State or the City are beneficiaries of access agreements with third parties in connection with the operation of the ICS Treatment Plant, the United States, the State, and the City shall use their best efforts to use those rights to provide access for CBS.

b. Simultaneously with CBS taking control of the ICS Treatment Plant under the proceeding Paragraph IV.B.2.a, all rights of ownership, if any, held by the City of Bloomington or the United States in the ICS Treatment Plant (excluding the underlying land, which the City of Bloomington shall continue to own) shall be transferred to, and held by, CBS. Such transfer of title shall occur automatically and without need of additional documentation or further action by the City of Bloomington, the United States, or CBS.

c. The Parties acknowledge that the ICS Treatment Plant was designed and constructed by U.S. EPA, operated and maintained by U.S. EPA until at least August 2, 2001, and operated and maintained by the State from August 2, 2001 to July 31, 2004, prior to CBS taking control of the plant under this Amendment. The Parties further

acknowledge that by taking ownership of the plant under this Amendment, CBS is not assuming any liability or any other responsibility for (1) the design and construction of the ICS Treatment Plant by the United States or its contractors, or (2) operation and maintenance of the ICS Treatment Plant prior to CBS's assumption of operation pursuant to this Paragraph IV.B.2.

d. The United States warrants that, as of the date of lodging of this Amendment, the ICS Treatment Plant is free from defects in design, construction, and workmanship, as well as free from defects resulting from the operation or maintenance of the facility prior to August 2, 2001. The State warrants that, as of the date of lodging of this Amendment, the ICS Treatment Plant is free from defects resulting from the operation or maintenance of the facility during the period of August 2, 2001 to July 31, 2004. CBS covenants not to assert any claims against the United States or the State for breach of this warranty, unless CBS becomes obligated (including by settlement agreement) to a person other than a party to this Amendment to pay damages or perform injunctive relief based on a claim relating to the ICS Treatment Plant (excluding any claim that amounts to a challenge to U.S. EPA's selection of a removal or remedial action), in which case, and solely to recover such damages or the costs of such injunctive relief, CBS reserves the right to assert claims against the United States and/or the State for breach of this warranty. The United States and the State reserve all defenses to such a claim, except that the United States and the State agree that they will not assert that CBS's claim for breach of warranty accrued prior to the time that CBS becomes obligated to a third party to pay damages or perform injunctive relief based on a claim relating to the ICS Treatment Plant. Any such claim for breach of warranty shall be brought in this Court pursuant to the Court's retention

of jurisdiction under Section XXXII of the Original Consent Decree. In determining whether or not the United States and/or the State breached the warranty provided under this paragraph, the Court shall apply federal law.

e. In the event that CBS receives notice of claim by a third party relating to the ICS Treatment Plant, which CBS believes may result in a claim under Paragraph IV.B.2.d above, CBS shall provide notice to the United States and the State of Indiana of such a claim within 60 days of the date that CBS first received notice of the claim. If CBS decides to pursue a breach of warranty claim against the United States and/or the State, CBS shall provide notice of its intent to assert such a claim, in which case the parties shall enter into a period of informal negotiations of at least 60 days from the date that the United States and the State of Indiana receive notice in an effort to resolve this claim before CBS asserts such a claim against the United States and/or the State pursuant to Paragraph IV.B.2.d above, and Sections XXIV and XXXII of the Original Consent Decree.

f. In the event that a third party asserts or attempts to assert a claim for damages or injunctive relief relating to the operation and maintenance of the ICS Treatment Plant from July 17, 2004 to the date that CBS takes control of the plant under this Amendment, CBS, the United States, the State and the City of Bloomington each reserves all rights and defenses each may have with respect to such claim.

g. CBS shall perform all Work at Lemon Lane Landfill in accordance with (i) the Lemon Lane Landfill ROD Amendment for the Groundwater, Surface Water and Sediment Operable Units (“Lemon Lane Landfill ROD Amendment for OU2/3”), which is attached as Appendix F, (ii) the Lemon Lane Landfill Statement of Work for the Surface Water, Groundwater and Sediment Remedial Action, (“Lemon Lane

Landfill SOW for OU2/3”), which is attached hereto as Appendix G, and (iii) all work plans and other plans, standards, specifications, and schedules approved by U.S. EPA under the Lemon Lane Landfill SOW for OU2/3 after reasonable opportunity for review and comment by the other Governmental Parties. The City shall implement the institutional controls required for the implementation of remedies for Lemon Lane Landfill for Operable Unit 1 (source control) and Operable Units 2 and 3 (control of PCB-contaminated groundwater, surface water and sediment) with respect to properties owned, leased, or otherwise controlled by the City.

### **3. Completion**

CBS shall continue to implement the Remedial Action and O&M at Lemon Lane Landfill until (1) CBS submits a demonstration pursuant to the “Completion of Work” clause in the Lemon Lane Landfill SOW for OU2/3 that all Work at Lemon Lane Landfill required under Paragraphs IV.B.1 and IV.B.2 above have been fully performed and (2) either U.S. EPA approves this demonstration or the Court overrules EPA’s disapproval of CBS’s demonstration pursuant to the “Completion of Work” clause in the Lemon Lane Landfill SOW for OU2/3 on the grounds that CBS has fully performed all Work at Lemon Lane Landfill required under Paragraphs IV.B.1 and IV.B.2.

### **C. Neal’s Landfill**

#### **1. Source Control Operable Unit**

CBS has completed all work requirements for implementation of the remedy for the Source Control Operable Unit for Neal’s Landfill (“Operable Unit 1”) in accordance with U.S. EPA’s ROD Amendment of March 29, 1999, except O&M. CBS shall continue and complete performance of O&M and other requirements set forth in the approved plans under

the Statement of Work for the Source Control Remedial Action at Neal's Landfill. These approved plans, which are herein incorporated by reference, are as follows:

- March 2001 - RCRA Cap Inspection and Maintenance Plan for the Neal's Landfill Site
- April 2002 - Long-term Groundwater Monitoring Plan for the Neal's Landfill Site

In the event that either of the above plans is updated pursuant to the terms of this Amendment or the attached Neal's Landfill Statement of Work for Operable Units 2 and 3 ("Neal's Landfill SOW for OU2/3") at Appendix I, the updated plan shall replace and supersede the relevant plan listed above.

## **2. Groundwater, Surface Water and Sediment Operable Unit**

a. As set forth in Paragraph II.F above, upon entry of this Amendment to the Consent Decree, CBS shall operate the water treatment plant at Neal's Landfill in accordance with the terms of the Neal's Landfill SOW for OU2/3 and applicable provisions of this Amendment to the Consent Decree.

b. CBS shall perform all Work at Neal's Landfill in accordance with (i) the Neal's Landfill Record of Decision Amendment for the Groundwater, Surface Water and Sediment Operable Units ("Neal's Landfill ROD Amendment for OU2/3"), which is attached as Appendix H, (ii) the Neal's Landfill SOW for OU2/3, which is attached hereto as Appendix I, (iii) all work plans and other plans, standards, specifications, and schedules approved by U.S. EPA under the Neal's Landfill SOW for OU2/3 after reasonable opportunity for review and comment by the other Governmental Parties, and (iv) the Remedy Confirmation Clause for Neal's Landfill at Section IX of this Amendment to the Consent Decree.

### **3. Completion**

CBS shall continue to implement the Remedial Action and O&M at Neal's Landfill until (1) CBS submits a demonstration pursuant to the "Completion of Work" clause in the Neal's Landfill SOW for OU2/3 that all Work at Neal's Landfill required under Paragraphs IV.C.1 and IV.C.3 above have been fully performed and all Performance Standards have been either achieved by CBS or waived by U.S. EPA as technically impracticable and (2) either U.S. EPA approves this demonstration or the Court overrules EPA's disapproval of CBS's demonstration pursuant to the "Completion of Work" clause in the Neal's Landfill SOW for OU2/3 on the grounds that CBS has fully performed all Work at Neal's Landfill required under Paragraphs IV.C.1 and IV.C.2 and that all Performance Standards have been either achieved by CBS or waived by U.S. EPA as technically impracticable.

## **V. PURPOSE OF THE CONSENT DECREE AND OBLIGATIONS OF THE GOVERNMENTAL PARTIES**

**A. Purpose:** Section IV (Purpose and Summary of Activities) of the Original Consent Decree is hereby rescinded. Following the effective date of this Amendment to the Consent Decree, any provision of the Original Consent Decree that would otherwise be construed to require CBS to construct an incinerator or incinerate excavated materials from any site shall have no force or effect.

**B. Governmental Parties' Obligations:** The United States, the State, the County and the City are hereby excused from all obligations under Paragraphs 7, 101, and 102 of the Original Consent Decree to review CBS's permit applications and plans for an incinerator or ash landfill. The United States, the State, the County, the City and CBS all

remain subject to the requirements of Paragraph 88 and 135 of the Original Consent Decree to use best efforts to accomplish the terms of the Consent Decree, including all amendments thereto, provided that nothing herein or in the Original Consent Decree shall require the United States to violate the Anti-Deficiency Act, 31. U.S.C. 1341 *et seq.*

C. **City and County Obligations:** The City and County shall not be required to perform their obligations (and give up their rights) with respect to the following provisions of the Original Consent Decree: Section V (Incineration Obligations), Section VI (Solid Waste Supplied by the City and County), and Section VII (Ash Disposal). The City shall continue to be bound by Paragraph 116 of the Original Consent Decree.

## **VI. PAYMENT FOR RESPONSE COSTS**

A. **Additional Payment by CBS:** Within 30 days of the Effective Date of this Amendment to the Consent Decree, CBS shall pay to the United States (in addition to the payment of \$1,000,000 made by CBS to the United States under Paragraph 115 of the Original Consent Decree) the amount of \$6,669,000 for Response Costs.

B. **Payment Mechanics:**

1. Payment shall be made by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 1980v03100, EPA Site/Spill ID Numbers LL - IND980794341, BD - IND006418651 and NL - IND980614556, and DOJ Case Number 90-7-1-212A. Payment shall be made in accordance with instructions provided to CBS by the Financial Litigation Unit of the United States Attorney’s Office for the Southern District of Indiana following lodging of the Amendment to the Consent Decree. Any

payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

2. At the time of payment, CBS shall send notice that payment has been made to the United States, to U.S. EPA, and to the Regional Financial Management Officer, in accordance with Section II.J of this Amendment to the Consent Decree.

3. The total amount to be paid by CBS pursuant to this Section VI shall be deposited in the Bloomington Special Account within the U.S. EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the sites covered by the Consent Decree or transferred by U.S. EPA to the U.S. EPA Hazardous Substance Superfund.

4. In the event that the payment required under this Section is not received when due, interest shall accrue on the unpaid balance through the date of payment at the rate specified for interest on investments of the U.S. EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

## **VII. PAYMENT FOR NATURAL RESOURCE DAMAGES**

A. **Natural Resource Damages Payment:** Within 30 days of the Effective Date of this Amendment to the Consent Decree, CBS shall pay to the United States the sum of \$1,881,000 for natural resource damages. CBS shall make this payment by electronic transfer to the United States in accordance with the current electronic funds transfer procedures and instructions to be provided to CBS by the Financial Litigation Unit, United States Attorney's Office for the Southern District of Indiana, following lodging of the Amendment to the Consent Decree. Any payments received by the Department of Justice



(“DOJ”) after 4:00 p.m. (Eastern Time) will be credited on the next business day. CBS shall provide notice of this payment to DOJ and the United States Department of the Interior (“DOI”) in accordance with Section II.J of this Amendment to the Consent Decree. In the event that the payment required under this Section is not received when due, interest shall accrue on the unpaid balance through the date of payment at the rate specified for interest on investments of the U.S. EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

**B. Allocation of Payment:**

1. Payment for Restoration Costs:

One million five hundred thousand dollars (\$1,500,000) of the amount to be paid by CBS pursuant to this Section shall be for deposit into the Bloomington Restoration Account, an account to be established within the DOI Natural Resource Damages Assessment and Restoration Fund (the “Restoration Account”). DOI will assign these funds a special project number to allow the funds to be maintained as a segregated account within the Restoration Account. All such funds shall be used by DOI to conduct or finance projects to permanently protect and restore riparian and forested wetland habitat in the White-River/Patoka River watershed to benefit impacted fish and wildlife species that the United States alleges to be injured by hazardous substances at the Remaining Sites. In particular, these projects will benefit birds, fish and bats through conversion of marginal agricultural land to palustrine open water emergent scrub shrub and forested habitats, and will be coordinated with the North American Waterfowl Management Plan and the Emergency Wetlands Resources Act. Any use by DOI of such funds for the purposes not

specified in this Amendment to the Consent Decree will not affect in any manner the rights and obligations of CBS under the Consent Decree.

2. Reimbursement of Assessment Costs

Three hundred eighty-one thousand dollars (\$381,000) of the amount to be paid by CBS pursuant to this Section shall be to reimburse damage assessment costs incurred by DOI.

**VIII. COVENANTS NOT TO SUE**

**A. Anderson Road Landfill, Winston-Thomas Facility, Neal's Dump, and Other Areas:** With respect to Neal's Landfill, Lemon Lane Landfill and Bennett's Dump, Section XXIII (Covenant Not to Sue) of the Original Consent Decree is hereby amended and superseded by Section VIII.B and C below. In all other respects, the Covenant Not to Sue in the Original Consent Decree remains in full force and effect.

**B. Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump:**

1. Effective upon entry of this Amendment to the Consent Decree, and conditioned only upon compliance by CBS with the provisions of this Consent Decree including this Amendment, and subject to the reservation of rights set forth in Paragraph VIII.B.4 below, the United States, State, City and County hereby covenant not to assert against CBS in any civil or administrative action or proceeding (i) any claim alleged in the complaints and amended complaints in these actions or (ii) any claim arising under federal, state or local law, including common law, intended to protect the environment, in either case resulting from or relating to:

a. The past disposal or discharge of PCBs or materials contaminated with PCBs at Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump.

For purposes of the preceding sentence, the “past disposal or discharge” includes the subsequent migration of PCBs or materials that first entered the environment before entry of the Original Consent Decree.

b. The release or threatened release of PCBs or materials contaminated with PCBs from Neal’s Landfill, Lemon Lane Landfill or Bennett’s Dump. For the purposes of the preceding sentence, the “release or threatened release of PCBs” does not include releases or threatened releases from PCBs that first enter into the environment after the entry of the Original Consent Decree through the conduct of CBS, its contractors, representatives, or agents.

c. The release or threatened release of hazardous substances other than PCBs from Neal’s Landfill, Lemon Lane Landfill, or Bennett’s Dump. For the purposes of the preceding sentence, the “release or threatened release of hazardous substances other than PCBs” does not include releases or threatened releases from hazardous substances that first enter into the environment after the entry of the Original Consent Decree through the conduct of CBS, its contractors, representatives or agents.

d. Activities which CBS performs in compliance with the Consent Decree including, but not limited to, releases occurring as a result of CBS implementing the Work required under the Consent Decree, but excluding the performance of activities in a manner which violates standards of care required by applicable federal, state or local law, including common law.

2. Nothing herein shall be construed to relieve CBS from any liability at law or equity for (1) failure to perform in accordance with this Consent Decree or (2) any acts, omissions or events not expressly referred to in this Covenant. Subject to the

provisions of Section XXVII (Delay or Prevention of Performance) of the Original Consent Decree, in the event that this Court determines that CBS has failed to perform its obligations under this Amendment to the Consent Decree, the Covenant in favor of CBS shall become null and void and of no further force or effect except with respect to those sites and areas as to which CBS has performed its obligations under this Decree; and the United States, State, City and County, or each of them, may seek relief at law or in equity for any matters except to the extent that the Covenant remains effective.

3. To the extent that the law of the State of Indiana may be determined to control and govern the interpretation of this Consent Decree, the Parties hereto do not intend that this Covenant Not to Sue shall be a release as that term is defined by Indiana law. The Parties hereto intend that this provision shall be construed to be a covenant not to sue civilly, execute judgment, or take any civil or administrative action against CBS and only CBS but including its directors, officers, agents and employees. Nothing herein shall be construed to release any claims, causes of action, or demands in law or equity against any person or entity not party to this Consent Decree.

4. The Parties have determined on the basis of currently available information that the remedies for Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump provided under this Amendment to the Consent Decree are adequate to abate the release or threat of release of hazardous wastes or substances from sites and areas that are the subject of the Consent Decree and do not believe that further remedies will be necessary. However, presently unknown or unforeseen conditions may present an imminent and substantial endangerment to health, welfare or the environment in the future. Subject to the provisions of Paragraph 82 of the Original Consent Decree, and in addition

to the powers granted the On Scene Coordinator pursuant to Section XVII (On Scene Coordinator) of the Original Consent Decree, nothing in this Section VIII.B or in this Consent Decree as amended is intended to affect the statutory rights of the United States as follows:

a. United States' Pre-certification Reservations: The United States reserves, and this Consent Decree is without prejudice to, the right to seek appropriate relief to abate a release or threat of release of hazardous wastes or substances, or to seek cost recovery for removal or remedial actions undertaken by the United States or State to abate such a release or threat of release, where such release or threat of release may present an imminent and substantial endangerment to health, welfare or the environment and results from previously unknown or unforeseen conditions that arise or are discovered after entry of this Amendment to the Consent Decree but prior to the Certification of Completion of the Remedial Action with respect to the Remaining Site where the release or threatened release occurs.

b. United States' Post-Certification Reservations: The United States reserves, and this Consent Decree is without prejudice to, the right to seek appropriate relief to abate a release or threat of release of hazardous wastes or substances, or to seek cost recovery for removal or remedial actions undertaken by the United States or State to abate such a release or threat of release, where such release or threat of release may present an imminent and substantial endangerment to health, welfare or the environment and results from previously unknown or unforeseen conditions that arise or are discovered after Certification of Completion of the Remedial Action with respect to the Remaining Site where the release or threatened release occurs.

**C. Covenant Not to Sue for Natural Resource Damages**

Notwithstanding any other provision of the Original Consent Decree or any of its amendments (including this Amendment), upon payment of the amount specified in Section VII above, the Covenant Not to Sue in Paragraph 111 of the original Consent Decree and the Covenant Not to Sue in this Section VIII shall bar all claims that the United States, the State, the County and the City may have either now or in the future for natural resource damages arising from or relating to the past disposal or discharge, or the threatened release of PCBs, materials contaminated with PCBs, or other hazardous substances at or from (1) Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump as defined in this Consent Decree Amendment; (2) Winston-Thomas Facility, Neal's Dump, and Anderson Road Landfill as defined in the Original Consent Decree, as previously amended, and (3) all other sites and areas identified in Sections VIII and IV, or pursuant to Paragraphs 47 and 51 of the Original Consent Decree as amended. Such Covenants Not to Sue shall not be subject to any reservation of rights by the United States or any other Party to reassert such claims against CBS based on any new information or previously unknown or unforeseen conditions.

**D. Covenant Not to Sue by CBS**

1. Upon the Effective Date of this Amendment to the Consent Decree, CBS Covenants Not to Sue and agrees not to assert any claims against the United States, the State, the City, or Monroe County with respect to its claim for breach of contract or any violation of the Original Consent Decree arising prior to the Effective Date of this Amendment to the Consent Decree. Such Covenants Not to Sue shall not be subject to any reservation of rights by CBS, except as set forth below in Paragraph VIII.D.2 below.

2. CBS maintains that the State is liable for breach of the Original Consent Decree as a result of State legislature's enactment of Burns Ind. Code § 13-7-16.5-9 (recodified as Burns Ind. Code §§ 13-17-10-1 through 13-17-10-4) or of Burns Ind. Code § 13-7-8.5-11.3 (recodified as Burns Ind. Code § 13-22-3-9) (hereinafter "Breach of Contract Claim"). CBS's Covenant Not to Sue the State on the Breach of Contract Claim shall remain in effect only for as long as the United States does not take any civil or administrative action to seek additional relief pursuant to Paragraph 111(e) of the Original Consent Decree, or Sections IV.C.2.b or VIII.B.4 of this Amendment to the Consent Decree. In the event that the United States seeks such additional relief under any of the above listed provisions, CBS will have the right to pursue its Breach of Contract Claim against the State pursuant to Sections XXIV (Dispute Resolution) and XXXII (Retention of Jurisdiction) of the Original Consent Decree by filing a notice of its intent to pursue this Breach of Contract Claim within 90 days after the United States' action. The State agrees that it will not raise the defenses of statute of limitations or laches for the time period beginning on August 22, 2002 (the date of the Tolling Agreement among the United States, the State, and CBS), provided that a notice of CBS's intent to pursue such Breach of Contract Claim is timely filed with the Court under the terms of the preceding sentence.

**E. Waiver of Claims Against Hazardous Substances Response Trust Fund and the United States**

1. Paragraph 114(a) of the Original Consent Decree is hereby rescinded and superseded.
2. CBS agrees not to assert any claims or demands for compensation or payment under CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of

law or under this Consent Decree against the Hazardous Substances Response Trust Fund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507), for or arising from any activity performed or expenses accrued pursuant to this litigation or under this Consent Decree, provided, however, that U.S. EPA hereby approves the Work which CBS is required to take pursuant to this Consent Decree as consistent with the National Contingency Plan for the purpose of allowing CBS to assert against any other person (other than Parties to this Consent Decree) any claim with respect to hazardous waste generated by that person.

3. Except as set forth in Paragraph IV.B.2.d and IV.B.2.f, CBS agrees not to assert any claims or demands for compensation or payment under CERCLA Sections 107 or 113 or any other provision of law against the United States for or arising from any activity performed or expenses accrued pursuant to this litigation or under this Consent Decree.

4. Nothing in this Paragraph VIII.E shall impair the obligation of the United States to fully pay in the event that the Court determines that the United States is liable to CBS for breach of the warranty provided by the United States in Paragraph IV.B.2.d.

## **IX. REMEDY CONFIRMATION CLAUSE FOR NEAL'S LANDFILL**

### **A. General**

1. The remedy selected by U.S. EPA in the Neal's Landfill ROD Amendment for OU2/3 is intended to reduce PCB concentrations in fish in Conard's Branch to "target" concentrations, which U.S. EPA has determined to be protective of



human health and the environment. These target concentrations are set forth in Table 1 below.

Table 1

<b>Target PCB Concentration to Protect Ecological Receptors</b>	
<b>Sampling Location <sup>(1)</sup></b>	<b>Target Mean PCB Concentration in Whole Fish (mg/kg Wet Basis)</b>
Location B – lower reach of Conard’s Branch above Vernal Pike Bridge	2.3
Location D – Richland Creek at the Vernal Pike Bridge	0.9
<b>Target PCB Concentration to Protect Human Receptors</b>	
<b>Sampling Location <sup>(1)</sup></b>	<b>Target Mean PCB Concentration in Fillets (mg/kg Wet Basis)</b>
Location F – Richland Creek at State Route 43 Bridge in Owen County	0.2

(1) “B”, “D”, and “F” refer to fish sampling locations as previously designated and utilized in 2001 - 2005 sampling

2. The Parties believe that the remedial actions selected by U.S. EPA in the Neal’s Landfill ROD Amendment for OU2/3 (hereinafter, for the purposes of this Section, “the remedy”) are adequate to achieve the above target concentrations in a period of 10 years (or less) from the date of the completion of construction of the Remedial Action to address PCB contamination in groundwater, surface water and sediment at Neal’s Landfill. The purpose of this Section IX Remedy Confirmation Clause (“RCC”) is to provide a process (subject to conditions set forth in Paragraphs IX.F and IX.G below) for U.S. EPA to modify the remedy for groundwater, surface water, and sediment contamination if U.S. EPA concludes, based upon criteria set forth in Paragraph IX.D, that the remedy has not achieved and will not achieve the target concentrations in fish.

3. To measure progress toward achieving the target concentrations for PCBs in fish, CBS shall collect fish samples from the sampling locations in Table 1 above (*i.e.* locations B, D and F) in accordance with a Sampling Plan approved by U.S. EPA under Paragraph IX.H below. The Parties shall use these fish samples to determine the mean concentration of PCBs in fish at each sampling location, and then the Parties shall use this mean concentration to measure progress toward achieving the target concentrations for PCBs in fish. For the purpose of this RCC, the term “mean concentration of PCBs in fish” shall refer to a simple arithmetic mean of fish tissue PCB concentrations at each sample location based upon the sample mixes set forth in the chart below. CBS shall continue to perform fish monitoring in accordance with the approved Sampling Plan until (1) CBS demonstrates statistically, in accordance with the methodology set forth in Paragraphs IX.B and IX.C below, that the mean concentration of PCBs in fish at each sample location is equal to or less than the pertinent target concentration, or (2) U.S. EPA modifies the remedy in accordance with the procedures set forth under this RCC, in which case CBS’s further monitoring obligations shall be determined consistent with the modified remedial action.

<b>Population of Fish Sampled to Measure Progress Toward Achieving Target Concentrations in Fish Protective of Ecological Receptors</b>	
<b>Sampling Location</b>	<b>Sample Mix</b>
Location B – lower reach of Conard’s Branch above Vernal Pike Bridge	50% Creek Chub 50% Green Sunfish, or 100% Creek Chub (if insufficient sunfish available)
Location D – Richland Creek at the Vernal Pike Bridge	33% Top Predator (e.g., Sunfish or Rock Bass) 33% Omnivores (e.g., Creek Chub) 33% Bottom Feeders (e.g. White Suckers)
<b>Population of Fish Sampled to Measure Progress Toward Achieving Target Concentrations in Fish Protective of Human Receptors</b>	
<b>Sampling Location</b>	<b>Sample Mix</b>
Location F – Richland Creek at State Route 43 Bridge in Owen County	75% Top Predator (e.g., Sunfish or Rock Bass) 25% Bottom Feeders (e.g. White Suckers)

4. U.S. EPA will evaluate the remedy every five years after the completion of construction to determine whether the mean concentration for PCBs in fish is statistically greater than or less than the target concentrations. Subject to the limitations set forth in Paragraphs IX.F and IX.G below, U.S. EPA may modify the remedy for groundwater and sediment contamination if it can statistically demonstrate that the remedy “has not achieved and will not achieve the target concentrations in fish” in accordance with the methodology set forth in Paragraphs IX.B and IX.D below, or in accordance with an alternative methodology mutually agreed to by U.S. EPA and CBS. In the event that U.S. EPA makes such a demonstration, it shall provide notice to CBS of this fact and of U.S. EPA’s intent to modify the remedy pursuant to the RCC. CBS will then have the opportunity under Paragraph IX.F below to challenge U.S. EPA’s determination. If CBS cannot meet its burden under Paragraph IX.F, U.S. EPA may modify the remedy subject to the limitations set forth under Paragraph IX.G below. In modifying the remedy, U.S. EPA shall be guided by the ROD amendment process in the National Contingency Plan.

5. Upon selection of the modified remedy by U.S. EPA, CBS shall be

required to perform the modified remedy. CBS, however, may exercise its right under Section XXIV (Disputes Resolution) of the Original Consent Decree to challenge U.S. EPA's selection pursuant to Paragraph IX.G.5 below.

**B. Statistical Hypothesis Testing**

1. There is inherent uncertainty in determining whether mean PCB concentrations in fish are above or below the target concentrations because of variability in sampling data. U.S. EPA and CBS shall use statistical sampling and analysis procedures to control the risk of reaching false conclusions with respect to whether the mean concentrations of PCBs in fish have achieved or will achieve the target concentrations set forth in Paragraph IX.A.1 above. Unless U.S. EPA and CBS, in consultation with the other Governmental Parties, mutually agree upon an alternative statistical methodology (e.g. regression analysis or statistical modeling), they shall use the statistical methodology known as "classical statistical hypothesis testing," which is described in the guidance documents *U.S. EPA QA/G-4 Guidance on Systematic Planning Using the Data Quality Objectives Process* (February 2006), and *U.S. EPA QA/G-9S Data Quality Assessment: Statistical Methods for Practitioners* (February 2006). U.S. EPA and CBS, in consultation with the other Governmental Parties, may mutually agree to use a regression model to test trends in the mean concentration of PCBs in fish, or to compare mean concentrations to target concentrations or historical data, while accounting for cofactors such as the year when sampling was conducted, the season when sampling was conducted, the sample location, the species of fish sampled, and the lipid content of the sampled fish.

2. The following terms shall be given the same meaning in this RCC that they have in the two guidance documents cited above:

- baseline condition
- alternative condition
- gray region
- false rejection of the baseline condition
- false acceptance of the baseline condition
- false rejection decision error limit
- false acceptance decision error limit

**C. Termination of CBS's Obligation to Modify Remedy under the RCC**

1. At any time after the completion of construction of the remedy to address PCB contamination in groundwater, surface water, and sediment at Neal's Landfill, CBS may request a determination by U.S. EPA that the remedy has successfully achieved the target concentration for PCBs in fish set forth in Paragraph IX.A.1. CBS shall use statistical hypothesis testing to demonstrate to EPA that the remedy has achieved the target concentrations set forth in Paragraph IX.A.1 at each sampling location. Thus, CBS shall perform a total of three tests, one for each location.

2. In conducting the statistical hypothesis tests, CBS shall assume as its baseline condition that the mean PCB concentration in fish from any given sampling location is equal to or greater than the target concentration for that sampling location. If CBS can statistically prove with 95% confidence the alternative condition (*i.e.*, if CBS can demonstrate that the mean PCB concentration for fish is below the target value by a statistically significant margin) for all sample locations, CBS will have adequately demonstrated that the remedy has been successful. At that point, CBS's obligations under this RCC will terminate and CBS and the United States will so notify the Court. CBS will continue to have operation and maintenance obligations at the Site. These O&M obligations will include fish sampling (at the reduced level specified in the Long-term Monitoring Plan approved by U.S. EPA under the Neal's Landfill SOW for OU2/3) in

support of U.S. EPA's five-year review process. If U.S. EPA does not concur with CBS's statistical demonstration under the previous Paragraph IX.C.1 and this Paragraph IX.C.2, CBS may petition the Court under Section XXIV (Dispute Resolution) of the Original Consent Decree to demonstrate that U.S. EPA's non-concurrence is arbitrary and capricious or otherwise not in accordance with law.

3. In the event that CBS cannot meet the test set forth in the preceding Paragraph IX.C.2 with respect to all sample locations but it can meet the test with respect to a sample location in Richland Creek (*i.e.*, sample location D or F), CBS shall be relieved of its obligation to implement the sampling plan for enhanced fish monitoring approved by U.S. EPA under Paragraph IX.H with respect to that sample location and shall implement instead at that location the fish sampling specified in the Long-term Monitoring Plan approved by U.S. EPA under the Neal's Landfill Statement of Work for Operable Units 2 and 3.

4. For the purpose of estimating sample sizes for conducting each statistical hypothesis test, CBS shall estimate sample requirements as follows:

a. The upper bound of the gray region shall be set at the target concentrations set forth in Paragraph IX.A.1;

b. The lower bound of the gray region shall be set at 20% less than the upper bound. Specifically, the lower bound will be set at 1.8 mg/kg for location B, 0.72 mg/kg for location D, and 0.16 mg/kg for location F;

c. The false rejection decision error limit at the upper bound of the gray region (*i.e.*, the boundary of the gray region at the target concentration) shall be set at 5%, and;

d. The false acceptance decision error limit at the lower bound of the gray region (*i.e.*, the boundary of the gray region opposite the boundary formed by the target concentration) shall be set at 20%.

5. In accordance with Paragraph IX.H.3, the parameters set forth in Paragraph IX.C.4 above may be modified in light of the number of fish that are reasonably available in the streams for sampling. In the event that the parameters set forth in Paragraph IX.C.4 are modified, CBS may petition U.S. EPA to modify the hypothesis test set forth in Paragraph IX.C.2. In response, U.S. EPA may determine that hypothesis test shall remain unchanged, or alternatively, U.S. EPA may modify the hypothesis test pursuant to the mutual agreement of U.S. EPA and CBS. In either event, the hypothesis test shall be performed in accordance with U.S. EPA's determination, except that CBS may exercise its right under Section XXIV (Disputes Resolution) of the Original Consent Decree to challenge U.S. EPA's determination that the hypothesis test shall remain unchanged on the grounds that U.S. EPA's determination is arbitrary and capricious or otherwise not in accordance with law.

**D. Evaluation of Achievement of Target Concentrations in Fish**

**1. First Five-Year Review**

a. To demonstrate at the first five-year review that the remedy has not achieved and will not achieve the target concentrations in fish, U.S. EPA must show that (1) the mean concentration of PCBs in fish at any sampling location is greater than the target concentration set forth in Paragraph IX.A.1 for that location, and (2) the mean concentration of PCBs in fish at the same location has shown no improvement in comparison to pre-remedy data collected from the same location in 2003 through 2005. To

make this showing, U.S. EPA shall satisfy each part of the following two-part test with respect to any one of the three sampling locations:

i. First Part: U.S. EPA shall use statistical hypothesis testing to demonstrate that the mean concentration of PCBs in fish at a sampling location has failed to achieve the target concentration for that location. In conducting this test, U.S. EPA shall assume as its baseline condition that the mean concentration of PCBs in fish at the sampling location is equal to or less than the target concentration for the sampling location. In the event that U.S. EPA can statistically prove the alternative condition with 95% confidence (*i.e.*, that the mean concentration of PCBs in fish is greater than the target concentration by a statistically significant margin) at any one of the three sampling locations, U.S. EPA may then proceed to the second part of the test.

ii. Second Part: For each sampling location where the mean concentration of PCBs in fish is greater than the target value by a statistically significant margin (*i.e.*, for any sampling location where U.S. EPA has rejected the baseline condition that the mean concentration of PCBs in fish at the location is equal to or less than the target concentration), U.S. EPA shall use statistical hypothesis testing to determine whether there has been an improvement in the mean concentration of PCBs in fish in comparison to pre-remedy data collected from the same location in 2003 through 2005, as shown in the documents identified under Paragraph IX.D.1.a.iii below. In conducting this test, U.S. EPA shall assume as its baseline condition that the mean concentration of PCBs in fish in year 5 is equal to or less than the mean concentration for PCBs in fish at the same sampling location in 2003 through 2005. In the event that U.S. EPA can statistically prove the alternative condition with 95% confidence (*i.e.*, that the mean concentration of PCBs in



fish at year 5 is greater than the mean concentration in 2003 through 2005 by a statistically significant margin) for at least one sample location, U.S. EPA will have adequately demonstrated that the remedy has not and will not achieve the target concentrations for fish set forth in Paragraph IX.A.1.

iii. For the purposes of the previous Paragraph IX.D.1.a.ii, the term “pre-remedy data” shall mean data included within the following documents:

(1) All documents listed below from the Administrative Record for the Neal’s Landfill ROD Amendment for OU2/3:

- Document 179 - From U.S. EPA - Split Fish Sample Analytical Results for the Neal's Landfill Site (7/23/04)
- Document 205 - From CBS - Neal's Landfill Fish Samples May 2003 Validation with Attachments (8/6/04)
- Document 206 - From CBS - Neal's Landfill Fish Samples November 2003 Validation with Attachments (8/11/04)
- Document 207 - From Tetra Tech - Tetra Tech's Data Validation Review of Neal's Landfill Fish Samples May 2003 Validation (8/17/04)
- Document 208 - From Tetra Tech - Tetra Tech's Data Validation Review of Neal's Landfill Fish Samples November 2003 Validation (9/1/04)
- Document 210 - From Tetra Tech - Fish Tissue Sample Analytical Results at the Neal's Landfill Site with Attachments (9/7/04)
- Document 212 - From CBS - Viacom's Comments to Tetra Tech's Data Validation Review of Neal's Landfill Fish Samples May 2003 Validation (9/22/04)
- Document 213 - From U.S. EPA - Revised Fish Sample Analytical Results at the Neal's Landfill Site with Attachments (9/21/04)
- Document 215 - From Tetra Tech Responses to Viacom's Comments on Data Validation Review of Neal's Landfill Fish Samples May 2003 Validation (10/5/04)

- Document 259 - From U.S. EPA - Fish Tissue Split Sample Analytical Results at Neal's Landfill with Attachments (2/20/06)
- Document 260 - From CBS - Fall 2005 Fish Tissue Sampling for Aroclor and Lipid Analysis at Conard's Branch and Richland Creek Near Neal's Landfill (2/27/06)
- Document 262 - From CBS - Neal's Landfill November 2005 Fish Sample Congener PCB Validation (3/23/06)
- Document 265 - From Tetra Tech - Tetra Tech's Data Validation Review of Neal's Landfill Fish Sample November 2005 Congener PCB Validation (4/27/06)

or (2) all other documents added as an update to the Administrative Record for the Neal's Landfill ROD Amendment for OU2/3, provided that any such document includes pre-remedy fish data collected in 2003, 2004, or 2005 from one or more of the fish sample locations set forth in Paragraph IX.A.1, and that such data qualifies as contract lab program ("CLP") data or has been subject to quality assurance and quality control ("QA/QC") safeguards equivalent to those required for CLP data. Any Party may propose to place additional fish data in the Administrative Record as an update to the Neal's Landfill ROD Amendment for OU2/3 for the purposes of this Paragraph, and U.S. EPA shall accept any such proposed data, provided that it satisfies the conditions set forth in the proceeding sentence (*i.e.*, the data were collected in 2003, 2004, or 2005 from one or more of the fish sample locations set forth in Paragraph IX.A.1, and such data qualifies as CLP data or has been subjected to QA/QC safeguards equivalent to those required for CLP data).

b. For the purpose of estimating sample sizes for conducting each statistical hypothesis test set forth in Paragraph IX.D.1.a.i above, U.S. EPA shall apply the following parameters:

- i. The upper bound of the gray region shall be set at a

value equal to the target concentration set forth in Paragraph IX.A.1, plus 20% of the target concentration. Specifically, the upper bounds will be set at 2.8 mg/kg for location B, 1.1 mg/kg for location D, and 0.24 mg/kg for location F;

ii. The lower bound of the gray region shall be set at the target concentration set forth in Paragraph IX.A.1;

iii. The false rejection decision error limit shall be set at 5% at the lower bound of the gray region (*i.e.*, the boundary of the gray region formed by the target concentration); and

iv. The false acceptance decision error limit shall be set at 20% at the upper bound of the gray region (*i.e.*, the boundary of the gray region opposite the boundary formed by the target concentration).

c. For the purpose of setting sample sizes for conducting each statistical hypothesis test set forth in Paragraph IX.D.1.a.ii above, U.S. EPA shall apply the following constraints:

i. The upper bound of the gray region shall be set at a value equal to 20% of the mean of the historical data for each fish species at each sampling location;

ii. The lower bound of the gray region shall be set at zero, (corresponding to the case that there is no difference between the mean concentration of PCBs in post remediation fish and the mean concentration for PCBs in fish at the same sampling location in 2003 through 2005);

iii. The false rejection decision error limit shall be set at 5% at the lower bound of the gray region, and

iv. The false acceptance decision error limit shall be set at 20% at the upper bound of the gray region.

d. In accordance with Paragraph IX.H.3, the parameters set forth in Paragraph IX.D.1.b and IX.D.1.c above may be modified in light of the number of fish that are reasonably available in the streams for sampling. In the event that the parameters set forth in Paragraph IX.D.1.b and IX.D.1.c are modified, CBS may petition U.S. EPA to modify the hypothesis tests set forth in Paragraph IX.D.1.a. In response, U.S. EPA may determine that the hypothesis tests shall remain unchanged, or alternatively, U.S. EPA may modify the hypothesis tests pursuant to the mutual agreement of U.S. EPA and CBS. In either event, the hypothesis tests shall be performed in accordance with U.S. EPA's determination, except that CBS may exercise its right under Section XXIV (Disputes Resolution) of the Original Consent Decree on the grounds that U.S. EPA's determination is arbitrary and capricious or otherwise not in accordance with law.

## **2. Second Five-Year Review**

a. To demonstrate at the second five-year review that the remedy has not and will not achieve the target concentrations in fish, U.S. EPA must show that (1) the mean concentration of PCBs in fish at one or more sample locations is greater than the target concentration listed in Paragraph IX.A.1 for that sample location, and (2) there is not a sufficient basis for U.S. EPA to conclude, based on trend data, that the mean concentration of PCBs in fish at that sample location will reach the target concentration in the future. To make this showing, U.S. EPA shall satisfy each part of the following two-part test with respect to any one of the three sample locations:

i. First Part: U.S. EPA shall repeat the same statistical

hypothesis testing that it used for the first part of the two-part test described above in Paragraph IX.D.1.a.i with respect to the first five-year review. Specifically, U.S. EPA shall use statistical hypothesis testing to demonstrate that the mean concentration of PCBs in fish at any sample location has not achieved the target concentration for that sample location. In conducting this test, U.S. EPA shall assume as the baseline condition that the mean PCB concentration in fish at a sample location is equal to or less than the target concentration set forth in Paragraph IX.A.1 with respect to that location. In the event that U.S. EPA can statistically prove the alternative condition (*i.e.*, that the mean concentration of PCBs in fish is greater than the target value with 95% confidence) for any sample location, U.S. EPA may then proceed to the second part of the test.

ii. Second Part: For each sampling location where the mean concentration of PCBs in fish is greater than the target concentration by a statistically significant margin (*i.e.*, for any sampling location where U.S. EPA has rejected the baseline condition that the mean concentration of PCBs in fish at the sample location is equal to or less than the target concentration), U.S. EPA shall use statistical hypothesis tests to determine if there is a decreasing trend at that location with respect to the mean concentration of PCBs in fish. In conducting this test, U.S. EPA shall assume as the baseline condition that there is no trend or the trend is increasing (trend is greater than or equal to zero) at the sample location. In the event that U.S. EPA cannot statistically prove the alternative condition (*i.e.* that PCB concentrations in fish are decreasing over time) with 95% confidence for at least one sample location, U.S. EPA will have adequately demonstrated that there is no significant decreasing trend and that failure to achieve the target concentrations in fish set forth in Paragraph IX.A.1 has occurred, and that the target

concentrations will not be met in the future.

b. For the purpose of estimating sample sizes for conducting statistical hypothesis testing set forth in Paragraph IX.D.2.a.i above, U.S. EPA shall apply the same parameters set forth in Paragraph IX.D.1.b above.

c. For the purpose of determining sample sizes for conducting each statistical hypothesis test set forth in Paragraph IX.D.2.a.ii above, U.S. EPA shall apply the following parameters:

i. The upper bound of the gray region shall be set at zero (corresponding to the case that there is no trend at that location with respect to the mean concentration of PCBs in fish);

ii. The lower bound of the gray region shall be set at a value corresponding to a 1% per year decrease in the mean concentration (*i.e.*, a slope for the trend line of  $-1\%$ );

iii. The false rejection decision error limit shall be set at 5% at the upperbound of the gray region; and

iv. The false acceptance decision error limit shall be set at 20% at the lower bound of the gray region.

d. In accordance with Paragraph IX.H.3, the parameters set forth in Paragraph IX.D.2.b and IX.D.2c above may be modified in light of the number of fish that are reasonably available in the streams for sampling. In the event that the parameters set forth in Paragraph IX.D.2.b and IX.D.2c are modified, CBS may petition U.S. EPA to modify the hypothesis tests set forth in Paragraph IX.D.2.a. In response, U.S. EPA may determine that hypothesis tests shall remain unchanged, or alternatively, U.S.

EPA may modify the hypothesis tests pursuant to the mutual agreement of U.S. EPA and CBS. In either event, the hypothesis tests shall be performed in accordance with U.S. EPA's determination, except that CBS may exercise its right under Section XXIV (Disputes Resolution) of the Original Consent Decree to challenge U.S. EPA's determination that the hypothesis tests shall remain unchanged on the grounds that U.S. EPA's determination is arbitrary and capricious or otherwise not in accordance with law.

### **3. Third Five-Year Review (and Beyond)**

a. Beginning with the third five-year review, U.S. EPA will no longer take into account the long-term trend of PCBs in fish to determine whether or not the remedy has achieved or will achieve the target concentrations set forth in Paragraph IX.A.1. Rather, U.S. EPA must show only that the mean concentration of PCBs in fish at any sampling location is statistically greater than the target concentration set forth in Paragraph IX.A.1 with respect to that location. To make this showing, U.S. EPA shall repeat the same statistical hypothesis testing that it used for the first part of the two-part tests described above in Paragraphs IX.D.1.a.i and IX.D.2.a.i with respect to the first and second five-year reviews with the baseline condition configured as described in those paragraphs.

b. For the purpose of estimating sample sizes for conducting statistical hypothesis testing set forth in Paragraph IX.D.3.a above, U.S. EPA shall apply the same parameters set forth in Paragraph IX.D.1.b.

c. In accordance with Paragraph IX.H.3, the parameters required under Paragraph IX.D.3.b above may be modified in light of the number of fish that are reasonably available in the streams for sampling. In the event that the parameters

required under Paragraph IX.D.3.b are modified, CBS may petition U.S. EPA to modify the hypothesis test set forth in Paragraph IX.D.3.a. In response, U.S. EPA may determine that hypothesis test shall remain unchanged, or alternatively, U.S. EPA may modify the hypothesis test pursuant to the mutual agreement of U.S. EPA and CBS. In either event, the hypothesis test shall be performed in accordance with U.S. EPA's determination, except that CBS may exercise its right under Section XXIV (Disputes Resolution) of the Original Consent Decree to challenge U.S. EPA's determination that the hypothesis test shall remain unchanged on the grounds that U.S. EPA's determination is arbitrary and capricious or otherwise not in accordance with law.

**E. Standard for Continuing Enhanced Monitoring**

If the statistical hypothesis tests described in Paragraphs IX.C and IX.D above are inconclusive (*i.e.*, they fail to prove either that the remedy has achieved the target concentrations or, alternatively, that the remedy has not achieved and will not achieve the target concentrations), CBS shall continue to perform the enhanced monitoring required by the Sampling Plan approved by U.S. EPA in accordance with Paragraph IX.H, below, except to the extent that CBS is relieved of this obligation in accordance with Paragraph IX.C.3 above.

**F. CBS's Right to Challenge U.S. EPA's Determination to Modify the Remedy**

1. In the event that U.S. EPA determines in accordance with Paragraph IX.D that the target concentration of PCBs in fish has not been achieved and will not be achieved at one or more sample locations, U.S. EPA will provide CBS with a notice of this determination and of U.S. EPA's intent to modify the remedy under the RCC. CBS then



will be given time to conduct an evaluation and submit a petition to U.S. EPA challenging this determination. To prevail on its challenge, CBS bears the burden of demonstrating at least one of the following:

- a. U.S. EPA's determination under Paragraph IX.D was incorrect;
- b. The failure to achieve the target concentration(s) in fish set forth in Paragraph IX.A.1 was caused by conditions at the Site changing after entry of this Amendment for reasons beyond the control of CBS; or
- c. Sampling Location B was the only sampling location where the mean concentration of PCBs in fish exceeded the target concentration set forth in Paragraph IX.A.1, and that improvements in PCB concentrations in fish tissue at other sampling locations show that the remedy is protective of mink based upon the assumptions and conclusions set forth in U.S. EPA's ecological risk assessment. In such a case, CBS may petition U.S. EPA for approval to reduce enhanced monitoring of PCB concentrations in fish.

2. In the event that CBS persuades U.S. EPA of the merits of its challenge, U.S. EPA shall not modify the remedy under this RCC. However, nothing in this RCC in any way limits any rights of the United States under the re-opener clause at Paragraph VIII.B.4 of this Amendment to the Consent Decree.

3. In the event that U.S. EPA does not accept CBS's challenge, CBS may exercise its right under Section XXIV (Disputes Resolution) of the Original Consent Decree to challenge U.S. EPA's determination on the grounds that it is arbitrary and capricious or otherwise not in accordance with law. Assuming that CBS does not challenge

U.S. EPA's determination (or dispute resolution is resolved in U.S. EPA's favor), U.S. EPA may proceed to modify the remedy subject to the limitations set forth in Paragraph IX.G.

**G. Modification of the Remedy under this RCC**

1. Within 180 days of issuance of U.S. EPA's notice of its intent to modify the remedy under the RCC (or, in the event that CBS invokes dispute resolution, within 60 days of a final decision by U.S. EPA or the District Court, whichever is later, determining that U.S. EPA may modify the remedy under this RCC), CBS shall submit to U.S. EPA for review and approval a work plan for investigating and evaluating additional remedies that would accord the incremental reduction in risk necessary to achieve the target concentrations set forth in Paragraph IX.A.1. This work plan shall include:

a. A proposed list of additional remedies that CBS shall investigate and evaluate. The supplemental remedies proposed by CBS may include, but are not limited to, the removal of additional sediments within the streams if the sediments are shown to be recontaminated above 1 mg/kg on average and the sediments are believed to be a main contributor to the PCB levels in fish.

b. A proposed schedule for investigating and evaluating the proposed remedies.

2. Upon approval of the work plan, CBS shall proceed with the investigation and evaluation of the supplemental remedies in accordance with the approved schedule. At the completion of the investigation, CBS shall submit to U.S. EPA for review and approval a proposed plan for modifying the remedy to achieve the target concentrations set forth in Paragraph IX.A.1. The proposed plan shall include:

- a. A description of the investigatory actions performed by CBS;
- b. An evaluation of the additional remedies based upon the nine evaluation criteria set forth in the National Contingency Plan for evaluating remedial actions;
- c. A recommendation as to the preferred supplemental remedial action; and
- d. All documents, reports or other materials that were prepared or considered by CBS in preparing the proposed plan, together with an index of this record.

3. In addition to submitting the proposed plan required under Paragraph IX.G.2, CBS may propose an alternative plan for modifying the remedy. In support of this alternative plan, CBS shall demonstrate that (i) the target concentrations set forth in Paragraph IX.A.1 are technically impracticable, (ii) target concentrations proposed by CBS as an alternative to those set forth in Paragraph IX.A.1 are protective of human health and the environment, and (iii) remedial alternatives proposed by CBS, including potentially a “no further action” alternative, will achieve the alternative target concentrations proposed by CBS. In the event that U.S. EPA determines that CBS has adequately demonstrated all three conditions, U.S. EPA shall publish the proposed alternative plan for public comment in accordance with the procedures set forth below in Paragraph IX.G.4. Alternatively, in the event that U.S. EPA determines that CBS has not adequately demonstrated one (or more) of the conditions, U.S. EPA may reject the alternative plan, and CBS may challenge U.S. EPA’s determination under Section XXIV (Dispute Resolution) of the Original Consent Decree on the grounds that U.S. EPA’s determination is arbitrary and capricious or otherwise not in accordance with law.

4. Unless the alternative plan is approved by U.S. EPA pursuant to Paragraph IX.G.3, U.S. EPA may approve CBS's proposed plan or it may prepare its own proposed plan for additional remedial measures to achieve the target concentrations set forth in Paragraph IX.A.1. In either event, U.S. EPA shall publish the proposed plan for public comment in accordance with the requirements of the National Contingency Plan. After receiving and reviewing public comments, U.S. EPA may select an additional remedial action to achieve the target concentrations set forth in Paragraph IX.A.1. This RCC does not provide U.S. EPA with the authority to modify in any way the remedial actions that have been implemented by CBS for Operable Unit 1 for Neal's Landfill.

5. In the event that CBS disagrees with any additional remedial measures selected by U.S. EPA under this RCC, CBS retains the right, prior to implementation, to challenge U.S. EPA's decision before the Court pursuant to Section 113(j)(2) of CERCLA on the ground that all or part of the decision is arbitrary and capricious or otherwise not in accordance with law. To the extent that CBS prevails on its challenge, it is not required to implement the additional remedial measures selected by U.S. EPA.

6. Within 60 days of U.S. EPA's selection of the additional remedial action (or, in the event that CBS challenges U.S. EPA's selection, within 60 days of the Court's decision upholding the U.S. EPA's selection), CBS shall submit to U.S. EPA for review and approval a proposed plan and schedule for the design and construction of the additional remedial action. Upon approval of this proposed plan, CBS shall proceed with the design and construction of the additional remedial measures in accordance with the approved schedule.

7. All plans, reports and schedules submitted to U.S. EPA for review and approval under this Paragraph IX.G are subject to the pertinent provisions of the Statement of Work for Operable Units 2 and 3 at Neal's Landfill with respect to the approval of deliverables.

**H. Sampling Plan**

1. Within two years of execution of the Consent Decree, CBS shall submit to U.S. EPA for approval a sampling plan for enhanced fish monitoring, containing a plan for statistical evaluation of the fish tissue data. The plan shall comply with requirements set forth in the Consent Decree and shall be consistent with U.S. EPA's Data Objective ("DQO") Process as described in U.S. EPA's publication, *Guidance on Systematic Planning Using the Data Quality Objectives Process, EPA QA/G-4 (February 2006)*. The plan shall require fish sampling at the locations where target concentrations are set in Paragraph IX.A.1.

2. Further, the enhanced fish monitoring plan shall require CBS to collect sufficient fish samples to meet the parameters set forth in Paragraphs IX.C and IX.D for statistical hypothesis testing. This plan will require composite samples of at least 3 fish per composite sample to reduce the overall variance.

3. In the event that U.S. EPA or CBS believes that sample size estimates and composite sampling in the enhanced fish monitoring plan will result in sampling requirements that are not reasonable in light of the limited number of fish available for sampling at the agreed-upon locations in Conard's Branch and Richland Creek, U.S. EPA and CBS shall confer in an effort to reach agreement upon whether or not there should be adjustments to (i) composite sampling requirements and/or (ii) the

sampling parameters set forth in Paragraphs IX.C and IX.D. In the event that U.S. EPA and CBS cannot reach agreement, U.S. EPA may determine that no adjustments to sampling requirements are necessary, or alternatively, U.S. EPA may adjust the sampling requirements. In either event, CBS shall implement the enhanced fish monitoring plan in accordance with U.S. EPA's determination, except that CBS shall have the right to challenge U.S. EPA's determination under Section XXIV (Disputes Resolution) of the Original Consent Decree on the grounds that U.S. EPA's determination is arbitrary and capricious or otherwise not in accordance with law.

4. The enhanced fish monitoring plan shall require that the fish chosen from each location be representative of the sizes of fish found at that location, consistent with past sampling events and representative of the size of fish eaten by the human and ecological receptors assumed in the risk assessments prepared by U.S. EPA. Generally this requirement can be met by showing that the mean size of fish collected are within 1 standard deviation of the same species of fish collected by CBS or U.S. EPA at the appropriate location during prior sampling events after the completion of the source control operable unit.

5. The enhanced fish monitoring plan should ensure a balanced data set of composite samples to be included in the mean from both summer and fall time periods at each location. Specifically, "balanced" means that there are an equal number of fall and summer samples to be included in the mean. The mean can be calculated for samples collected over one year or two years.

6. The fish are to be analyzed using total congener and lipid methods equivalent to those analytical methods used in 2005.

**X. RIGHTS AND RESPONSIBILITIES UNDER ORIGINAL CONSENT DECREE**

Except as expressly provided in this Amendment to the Consent Decree or in prior amendments to the Consent Decree, the Original Consent Decree remains binding upon the Parties.

**XI. TERMINATION**

Termination of CBS's obligations under this Amendment to the Consent Decree shall be governed by Paragraph 138 of the Original Consent Decree. The Covenants Not to Sue in Paragraph 111 of the Consent Decree and Section VIII of this Amendment to the Consent Decree shall continue in effect even after the CBS's obligations hereunder have terminated.

**XII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

**A. Lodging:** This Amendment to the Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Amendment to the Consent Decree disclose facts or considerations which indicate that the Amendment is inappropriate, improper, or inadequate. The State, County, City, and CBS consent to the entry of this Amendment to the Consent Decree without further notice.

**B. Agreement Voidable if Not Entered by the Court:** If for any reason the Court should decline to approve this Amendment to the Consent Decree in the form presented, this Amendment is voidable at the sole discretion of any Party and, if voided, the

terms of the agreement may not be used as evidence in any litigation between the Parties.

### **XIII. EFFECTIVE DATE OF THIS AMENDMENT TO THE CONSENT DECREE**

This Amendment to the Consent Decree shall be effective upon execution by the United States District Judge assigned to this matter as set forth below and upon entry on the docket of the U.S. District Court for the Southern District of Indiana. Subject to Section XI of this Amendment, it shall remain in full force and effect thereafter unless modified or voided by a federal court with jurisdiction over the matter.

### **XIV. FINAL JUDGMENT**

Upon approval and entry of this Amendment to the Consent Decree, the Consent Decree shall constitute a final judgment between and among the Governmental Parties -- the United States, the State of Indiana, the City of Bloomington and Monroe County -- and CBS. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2008

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RICHARD L. YOUNG  
United States District Judge



THE UNDERSIGNED PARTY joins in this Amendment to the Consent Decree providing for Remedial Actions at Neal's Landfill, Lemon Lane Landfill and Bennett's Dump and addressing general matters in United States, et al. v. CBS Corporation, Case No. 1:81-cv-0448-RLY-KPF (S.D. Ind.).

FOR THE UNITED STATES OF  
AMERICA

Date \_\_\_\_\_

\_\_\_\_\_  
RONALD J. TENPAS  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

Date 2-19-08

\_\_\_\_\_  
JOS. W.C. WARREN  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

TIMOTHY M. MORRISON  
Acting United States Attorney

CHARLES GOODLOE, JR.  
Assistant United States Attorney's  
United States Attorney's Office  
46 East Ohio Street, 5th Floor  
Indianapolis, Indiana 46204

For the U.S. Environmental Protection Agency

Date 2-8-08

RICHARD C. KARL  
Director of Superfund Division  
U.S. Environmental Protection Agency,  
Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604

Date 2/4/08

JEFFREY A. CAHN  
Associate Regional Counsel  
U.S. Environmental Protection Agency,  
Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604

THE UNDERSIGNED PARTY joins in this Amendment to the Consent Decree providing for Remedial Actions at Neal's Landfill, Lemon Lane Landfill and Bennett's Dump and addressing general matters in United States, et al. v. CBS Corporation, Case No. 1:81-cv-0448-RLY-KPF (S.D. Ind.).

FOR THE CITY OF BLOOMINGTON

Date: 2/15/2008

GEORGE GEOFFREY M. GRODNER  
Mallor, Clendening, Grodner & Bohrer, LLP  
511 Woodscrest Drive  
P.O. Box 5787  
Bloomington, IN 47407

THE UNDERSIGNED PARTY joins in this Amendment to the Consent Decree providing for Remedial Actions at Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump and addressing general matters in United States, et al v. CBS Corporation, Case No. 1:81-cv-0448-RLY-KPF (S.D. Ind.).

FOR THE STATE OF INDIANA

Date: February 5, 2008

GREGORY F. ZOELLER  
Chief Counsel  
Indiana Attorney General's Office  
Indiana Government Center South  
5th Floor  
302 West Washington Street  
Indianapolis, IN 46204

Date: 5 February 2008

WALERIE TACHTIRIS  
Deputy Attorney General  
Indiana Attorney General's Office  
Indiana Government Center South  
5th Floor  
302 West Washington Street  
Indianapolis, IN 46204

Date: FEBRUARY 5, 2008

THOMAS W. EASTERLY  
Commissioner  
Indiana Dept of Environmental Management  
Indiana Government Center North  
100 North Senate Avenue  
Indianapolis, IN 46204

THE UNDERSIGNED PARTY joins in this Amendment to the Consent Decree providing for Remedial Actions at Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump and addressing general matters in United States, et al. v. CBS Corporation, Case No. 1:81-cv-0448-RLY-KPF (S.D. Ind.).

FOR THE STATE OF INDIANA

Date:

2/14/08

Elizabeth Admire  
State Natural Resource Co-Trustee  
Indiana Dept of Environmental Management

Date:

2-15-08

John Davis  
State Natural Resource Co-Trustee  
Indiana Dept of Natural Resources

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FOR MONROE COUNTY

Date: 15 FEB. 2008

WILLIAM STEGER  
County Attorney  
Monroe County Legal Department  
Monroe County Courthouse, Room 220  
Bloomington, IN 47404

THE UNDERSIGNED PARTY joins in this Amendment to the Consent Decree providing for Remedial Actions at Neal's Landfill, Lemon Lane Landfill and Bennett's Dump and addressing general matters in United States, et al. v. CBS Corporation, Case No. 1:81-cv-0448-RLY-KPF (S.D. Ind.).

FOR CBS CORPORATION

Date: 2-7-08

Louis J. Briskman,  
Executive Vice President and General Counsel  
CBS Corporation  
51 West 52<sup>nd</sup> Street  
New York, NY 10019

Date: 2-12-08

David R. Berz  
Weil, Gotshal & Manges LLP  
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Washington, D.C. 20005  
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Counsel to CBS Corporation